No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

MAZILLA TIGHE, AH CHONG and
LEONG CHEUNG,
Appellees.

BRIEF FOR APPELLEE MAZILLA TIGHE.

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STATEMENT OF THE CASE.

The Maryland Casualty Company brought this action in the District Federal Court asking for declaratory relief under Federal Declaratory Judgment Act, 28 USCA §400, and for the purpose of having the coverage determined upon a certain policy it issued to one Ah Chong. This appeal is from the decision of that trial court which held the injury in question covered by the provisions of the policy. Although at the time certain other contentions in addition to policy coverage were advanced, apparently they have

now been abandoned, leaving here for consideration the sole issue of policy coverage.

The facts that gave rise to the instant action, and as set out in the findings and opinion of the trial court are as follows:

On the morning of November 26, 1937, about 8:30 A. M. the plaintiff, Mrs. Mazilla Tighe, was on her way to her place of employment in the White House on Sutter Street in San Francisco. She was proceeding in an easterly direction on the south sidewalk of Sutter Street, and was in the block prior to her destination, having reached a point on the sidewalk opposite the entrance of a restaurant named the "Piccadilly Inn". The sidewalk was about twelve feet wide and she was walking along the center about equidistant from the building and curb lines. When she had reached this point opposite the entrance, one Leong Cheung, defendant, an employee of Ah Chong, emerged from the doorway of this restaurant and in running back toward the curb for a further load of vegetables from a truck parked across the street, negligently collided with Mrs. Tighe, knocking her down and causing serious injuries.

It further developed the Leong Cheung was a young man of the Chinese race and at the time was in the employ of Ah Chong, a fruit and vegetable peddler who was using the truck for that purpose at the time of the accident. The Piccadilly Inn was one of his regular customers. Ah Chong drove the automobile and Leong Chung helped him as delivery boy. On the occasion of this accident, Leong Cheung was then engaged in making a series of deliveries under the

direct supervision and direction of Ah Chong, and after the accident he continued the process of unloading and made two or three more trips, carrying vegetables from the truck into the Piccadilly Inn before the unloading was completed.

Mazilla Tighe instituted an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against Ah Chong, who requested the Maryland Casualty Company, appellants, to defend him under the provisions of the policy herein involved. They declined, except under a reservation of right, and have brought this action for declaratory relief, contending:

CONTENTIONS OF APPELLANT.

(1) That the accident did not arise out of the use of the automobile described and covered by said policy in that the unloading was completed when the goods were physically removed from the truck, and the process of delivery is entirely different from unloading.

(2) That if under any circumstances delivery is part of the unloading, the unloading is complete when the delivery is actually made.

(3) So far as some future or additional unloading is concerned, it certainly would not start until some physical acts were performed on or about the truck for the purpose of effecting such unloading, and the mere intent in the mind of the boy in returning from the Piccadilly Inn, crossing the sidewalk and crossing the street to unload some further goods, constituted no act of unloading within the meaning of the policy.

STATEMENT OF ISSUE.

The provisions of the policy here involved are:

"Item 1: * * * The occupation of the named insured is Fruit and Vegetable Peddler

"'* * * The purposes for which the automobile is to be used are Commercial.

"'* * * The term 'pleasure and business' is defined as personal, pleasure, family and business use. (b) The term 'commercial' is defined as the transportation or *delivery of goods, merchandise or other materials, and uses incidental thereto,* in direct connection with the named insured's business occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated *includes* the *loading and unloading thereof.*

"'* * * Coverage A—Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile." (Italics ours.)

The single issue is:

Does the accident in the instant case fall within the foregoing provisions of the policy?

Although appellant's contention is not altogether clearly defined, our understanding is that the insurer attempts to escape liability by breaking up the process of unloading and delivery into discrete and discon-

tinuous "unloadings" and "deliveries" and apparently posits the following theory:

(1) That the "unloading" of goods is entirely distinct, different and disconnected from a "delivery" of same.

(2) That the policy protects the insured only against accidents arising out of an "unloading" and is inapplicable to a "delivery".

(3) That in the instant case the term "unloading" as used in the policy refers solely to the physical removal of merchandise from the truck, which occurred preliminary to any given trip across the street into the Piccadilly Inn.

(4) That the appellant is not liable because at the time of the sidewalk collision, the first "unloading" had been consummated and the second "unloading" had not been initiated, even though at said time said merchandise was at rest on the truck which was subsequently "unloaded" and "delivered" within the Inn.

The trial court, however, has pointed out in its opinion (Tr. p. 56), that this construction of the policy is entirely too narrow and that "unloading" was a continuing process which *included all removal of goods,* destined for the Inn, from the truck, *and all deliveries* of same into the Inn. In addition to this, we respectfully urge as indicated above, that appellant's construction does violence to the express terms of the policy, which indemnified the insured against losses arising out of the *use* of the truck, and spe-

cifically defines said use to include not only *"unloading"* but also *"delivery"* of merchandise transported by the insured vehicle.

ARGUMENT.

The court's attention is respectfully directed to the italicized words in the foregoing provisions of the policy. Our view is that unless the phrase *"delivery of goods, merchandise or other material"*, is utterly meaningless and nugatory, the policy, *by its express terms,* protects the insured against losses arising out of the unloading and the delivery of merchandise, both of which are specifically defined herein as *uses* of the automobile.

In attempting to resolve the above issue, consideration must be given to the nature of the assured's business, i. e., fruit and vegetable peddler, and to the specialized use of the insured's vehicle in such business, including the manner of unloading thereof, and the manner of delivery of merchandise therefrom. It must be presumed that the appellant was familiar with the foregoing business and that it was clearly within the contemplation of both parties at the time the contract of insurance was entered into. Specifically, it must be presumed that the appellant at the time the policy was issued, knew that the unloading and delivery of merchandise from the insured's truck, necessitated the removal of such goods from the vehicle by hand and their transportation by foot move-

ment into the purchaser's place of business, and that said unloading and delivery as to any particular vendee ordinarily required a series of trips to and from the truck and the vendee's place of business.

These necessary and inescapable presumptions, coupled with the essential facts of the instant case, logically compel us to adopt the view that at the time of the collision and resultant injury to Mrs. Tighe, the process of serial unloading and delivery was going on,—a process which was continuous, entire and non-severable as to those component elements or acts and which could not and did not end until all the goods purchased had been taken from the insured vehicle and delivered within the vendee Inn.

In an apparent attempt to import a subjective element into the case, appellant's brief repeatedly refers to employee Leong Cheung's "state of mind", declaring vigorously and repetitiously that the mere intent in the mind of Leong Cheung to go back across the sidewalk and there to unload further produce, did not constitute "unloading". There is no aura of mysticism enveloping the single issue raised by this appeal. In resolving that issue, we fail to perceive the necessity of indulging in physical abstractions. The criteria for the fixation of appellant's liability are not subjective, but, however, objective—they are certain physical, visible facts existing *at the time of the accident,* to-wit:

(1) That vegetables had already been taken from the truck into the Picadilly Inn.

(2) That Leong Cheong in the performance of his duty as delivery boy, was moving from the Inn toward the truck, for more produce, and

(3) That merchandise destined for the Inn was still on the truck, the removal of which was necessary to complete the unloading.

The order to bring in vegetables had been given by Ah Chong and Leong Cheung was a mere instrument or appliance of his employer, without initiative, volition or power of independent action and was functioning to carry out the order when he collided with Mrs. Tighe.

It is undeniable that the term "delivery" denotes change, transfer or surrender of possession. A removal of goods from a vehicle and the deposit of same upon the sidewalk would not constitute "delivery" in the ordinary and universally recognized sense of that term. In the instant case the vegetables in Ah Chong's truck could not be delivered until they had been deposited in a place of rest upon the purchaser's premises. In the light of all the circumstances of this case, the operation of "unloading" and "delivery" are logically and effectually inseparable; they cannot be disassociated and together form one continuous unitary process. In the vast majority of cases construing automobile liability policies, commodities taken from the insured vehicle are placed on the sidewalk, or platform, or hand-truck, or some other place of temporary deposit, before possession is transferred by the vendor to the vendee. In the case at bar, however, it must be

borne in mind that there was no intermediate place of position or rest, or deposit, between the truck and the kitchen of the Inn, from the time they were lifted from the truck until the time they were placed in a position of rest within the kitchen, and the vegetables were in a course of continuous unbroken transit. It was because of this decisive factor, we believe, that the court below held that the process of unloading included the delivery of the vegetables. Assuming that the policy in question was completely silent on the subject of delivery, we urge that accidents occurring during this single continuous process would fall within that portion of the policy that defines "unloading" as one of the *uses* of the automobile, and, that the process of unloading began with the removal of the first vegetables, and continued without break or pause, and did not end until the last of the purchased goods had been deposited in the Inn's kitchen.

In placing a construction and limitation upon the insurer's legal responsibilities within the policy coverage, the courts sometimes state the problem in terms of legal causation. In endeavoring to define the limitation of the legally protected interest, all cases must be considered in the light of their particular facts. In the instant case, the negligent act and resulting injuries occurred as an incident within the processes of serial unloading. Unloading and delivery were the hazards contemplated and within the facts of this case were the direct and primary cause of the injury. The accident and injury had a peculiar and necessary connection with the process and was intrinsically re-

lated to the use of the automobile. It arose as a natural and probable consequence of the unloading and delivery process.

In *Panhandle Steel Products Co. v. Fidelity Union Casualty Co.,* 23 S. W. (2d) 799 (Texas), the court uses language:

> "* * * since the act of unloading was one of the natural and necessary steps to the undertaking to deliver the beam, and followed in natural sequence, the use of the truck to that end, which use was specifically contemplated and covered by the policy, we believe that the conclusion is unavoidable, that the use of the truck was the primary and efficient cause of the injury, even though it should not be held to be the proximate cause, within the meaning of that term as employed in acts based on negligence of the defendants."

We refer further to the case of *Park Saddle Co. v. Royal Indemnity Company,* 81 Mont. 99, 111, 261 Pac. 880, where the policy of insurance insuring plaintiff against loss arising out of liability for bodily injury by reason of the maintenance and use, or maintenance or use of saddle or pack horses, the guide carelessly and negligently allowed the party to become lost and by reason of said fact, it was necessary to cross dangerous and steep mountain sides and inclines, and when so doing the tourist was required to dismount from the horses and to lead them. While so doing, one of the party slipped, caught her heel and fell, causing injury.

> "If it had not been for the saddle horses, the trip would not have been undertaken, and it was

by the use of the horses, and not otherwise, that the party arrived at the place of danger. As a protection, not only to the rider, but to the horse, it was deemed necessary for the rider to dismount and proceed on foot. The entire transaction grew out of, and the accident happened on account of, or by reason of, the use of horses, and it grew out of the use of the horses in the operation of the insured's business."

"* * * in this view it cannot be said he knew that the accident was not caused efficiently and proximately by the use of the horses and operation of the insured's business or, to follow the language of the policy 'by reason of the maintenance and use of saddle horses, in connection with the assured's business'."

In this connection see:

Mullen v. Hartford Accident and Indemnity Co., Supreme Court of Mass. 191 N. E. Rep. 394;

United Mutual Fire Ins. Co. v. Jamestown Mutual Fire Ins. Co., 242 App. Div. 420, 275 N. Y. S. 47.

CASES CITED BY APPELLANT ABUNDANTLY SUPPORT THE TRIAL COURT'S CONTENTION.

We consider that we would be remiss if we did not correct a misstatement in the appellant's brief on page 12, where he states that the trial judge neither cited nor relied upon any authority construing the policy. Appellant will recall that upon the trial of this case he cited all the cases herein cited and argued and

briefed all the authorities contained in the instant brief, and that they were most carefully considered. We have been cited no cases where accidents occurred as part of the delivery and unloading process that do not support the trial court's decision. To indicate this more clearly we have classified and distinguished these cases cited by appellant into three divisions:

AUTHORITIES CLASSIFIED AND DISTINGUISHED.

I. CASES WHERE, AT THE TIME OF THE ACCIDENT, THE PROCESS OF UNLOADING HAD ALREADY BEEN COMPLETED.

Luchte v. State Automobile Mutual Ins. Co., 197 N. E. 421, 50 Ohio App. 5 (1935). (Appellant's brief p. 19.) Plaintiff in this case was in the retail coal business and had, through an employee, delivered coal to a customer by dropping the coal in the street in front of the customer's house. He drove away and failed to leave any light or warning on the pile of coal. One Bell drove his motorcycle into the pile of coal and was killed. The negligent act alleged is leaving the pile of coal "unprotected and without lights or warning, contrary to a city ordinance". Apparently no loading clause was involved, mere use, ownership and intention.

Morgan v. N. Y. Cas. Co. (Ga. 1936), 188 S. E. 581. (Appellant's brief p. 20.) One Morgan operated a fuel company and insured its trucks, in the "transportation of materials and merchandise, including the loading and unloading". An employee in delivering coal through a chute in the sidewalk, left the chute

unattended. The complaint alleged the plaintiff fell into the coal chute after dark, and that the defendant coal company was negligent in having left the chute open, unguarded or without warning or red light. The coal truck was in no way mentioned or referred to in plaintiff's petition.

Stammer v. Kitzmiller, et al. (Wis. 1937), 276 N. W. 629. (Appellant's brief p. 21.) An employee of a brewing company, in using one of the trucks to deliver beer to a tavern, parked the truck alongside the curb, got out, opened a hatchway in the sidewalk; then he removed a barrel of beer from the truck and placed it either on the sidewalk or street pavement. He then lifted the barrel and put it through the hatchway into the basement of the tavern. After completing this and while he was engaged in having a sales slip for the beer signed inside the tavern, plaintiff fell into the open hatchway left unguarded by the employee. The coverage clause included "operation, maintenance or use (including transportation of goods, loading and unloading) of the automobile".

The court points out that considerable time had elapsed after anything was done which could reasonably be said to be connected with the actual unloading here.

Armour & Company v. General Accident, Fire & Life Assurance Corporation, Ltd. (Number 20,287-L; District Court of the United States, Northern District of California, Southern Division; decided November 2, 1939.) (Appellant's brief p. 18.) In this case an

employee unloaded hams from an automobile and by use of a small hand truck transported them into a market. It was customary for the proprietor of the market to weigh the hams before accepting delivery. On this occasion, however, the proprietor was absent at the moment, *and the delivery man went away and left the hams,* intending to return later to check the weight and pick up the invoice he had left. The delivery man was negligent in leaving the hand truck containing the hams in a dangerous place; and by reason of that negligence the customer of the market was injured. Clearly no active delivery was involved. The man had departed, the proximate cause of the injury was the leaving of the hand truck in a dangerous place.

Zurich General Accident & Liability Ins. Co., Limited, v. American Mut. Liability Ins. Co. of Boston, 192 Atl. 387, 118 N. J. Law 317 (1937). (Appellant's brief p. 15.) The delivery man rolled a can of milk into the back of a store where the proprietor had his ice box and lifted the milk into the ice box. He was servicing the ice box when the ice pick in his rear pocket caused injury. The court states:

> "The assured's servant was then engaged in the *servicing* of delivered milk upon Borer's premises, an act entirely disconnected with the unloading of the articles from the vehicle." (Italics ours.)

II. CASES WHERE ALTHOUGH PROCESS OF UNLOADING WAS INCOMPLETE AT THE TIME OF THE ACCIDENT, THE CAUSE OF THE ACCIDENT WAS BUT INDIRECTLY OR INCIDENTALLY RELATED TO THE USE OF THE VEHICLE OR THE UNLOADING THEREOF, OR WHERE ACCIDENT RESULTED FROM SOME ACT OR CIRCUMSTANCE ENTIRELY DISCONNECTED WITH SAID UNLOADING.

Franklin Co-Op. Creamery Ass'n v. Employers' Liability Assurance Corporation, et al. (Minn. 1937), 273 N. W. 809. (Appellant's brief p. 14.) An employee stopped his milk wagon in front of a building, filled his containers with milk bottles, and entered the building. After entering the building he walked about thirty feet to a freight elevator, set down his container, and then, for the purpose of using the elevator, pulled on the ropes or cables which controlled its operation. In so doing he injured a third person. The court held, at page 811:

> "The operation of the freight elevator wholly within the building, and remote from the wagon, solely for the driver's convenience in ascending to the third floor, had nothing whatever, in our opinion, to do with the 'use' of the teams or vehicles."
>
> "* * * however, it seems to us, that even assuming the word 'unloading' had a peculiar significance in the milk trade, in Minneapolis, yet by no stretch of the imagination could the court have contemplated the running of a freight elevator in no way connected with the milk company's business other than to house some of its customers, or that the policy could have been intended by either party to cover the operation of the freight elevators for the driver's sole convenience, accompanied as it was by a concededly extra hazard."

John Alt Furniture Co. v. Maryland Casualty Co., 88 F. (2d) 36 (Circuit Court of Appeals, Eighth Circuit) (1937). (Appellant's brief p. 17.) In this case the insured had been engaged in delivering furniture to a customer. In order to carry the furniture from the truck to the customer's apartment, it was necessary to remove the doors from the building. The door was leaned against a clothes pole on the property and blown by the wind, fell, causing injury to an occupant of the premises. The court rightly held that the causal chain was broken and that the accident arose out of a circumstance which was but incidentally related to the "unloading" process; that the unloading was not the direct and proximate cause of the injury. The appellant seeks to create the impression that the accident occurred before the unloading of the furniture had been completed (See pages 17-18 of the brief.) However, there is no justification for this implication. The court stated:

> "The door had been in this position about a half hour to an hour while the assured's employees were taking the furniture into the flat, when the wind apparently blew the door over and in falling the top of the door struck Lola Olsen, etc."

III. ANOMALOUS CASES WHICH ARE IRRELEVANT TO THE POINTS OR THE ISSUES HERE PRESENTED EITHER BECAUSE (a) A COMMERCIAL VEHICLE WAS NOT INVOLVED, OR (b) NO LOADING OR UNLOADING CLAUSE INVOLVED.

Jackson Floor Covering Co. v. Maryland Casualty Company, 189 Atl. 84, 117 N. J. Law 401 (1937). (Ap-

pellant's brief p. 13.) The language of exclusion from coverage in this case was:

> "Automobile, vehicle, or any draught or driving animal."

It was appellant's, Maryland Casualty Company's, point that a hand truck involved in the accident was a "draught vehicle" within the terms of the policy. However, the learned trial judge properly held otherwise.

Panhandle Steel Products Co. v. Fidelity Union Casualty Co., 23 S. W. (2d) 799 (Texas). (Appellant's brief p. 28.) This case involved the delivery of a structural steel beam at the purchaser's plant and:

> "While the beam of iron was being moved across the sidewalk into the building, and when about one-half the beam was off the truck, Miss Ida Godley happened to pass along the sidewalk and was injured. Insurance covered the truck for 'business and pleasure' and insured against loss from liability by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, either instantaneous or not."

The court reached the conclusion that the injury was the result of its use, irrespective of whether or not the word "maintenance" should be construed as having substantially the same meaning as the word "use".

We desire to call attention to the tendency of the courts to adopt a liberal construction in their interpretation of coverage provisions, in the case of *Merchants Co. et al. v. Hartford Accident and Indemnity*

Co., et al., Miss. Supreme Court (1939), 188 So. 571, the Merchants Company, while making deliveries to retail customers, one of its trucks went into a roadside ditch on a public highway and it was necessary to use several large poles in extricating the truck. When this was done the operator of the truck drove away, leaving the poles in the road. That night Grubbs, a traveler in a passenger automobile, struck one or more of the poles and was severely injured. The Merchants Company held an insurance policy obligating the insurer to pay all sums payable by reason of damages for accidental bodily injury to any person, arising out of the ownership, maintenance or use of automobiles:

> "Our conclusion, under a policy such as is here before us, is that where a dangerous situation caused injury either one of which arose out of or had its source in the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation * * *"
>
> "* * * Certainly the use of the poles to extricate the truck from the roadside ditch was an event which arose out of, transpired in, and was necessary to, the operation of the truck * * * the next event which happened was that the truck drove away, leaving the poles in the road, but the poles were not left until the moment when the truck drove away."

RECENT CASE REJECTS APPELLANT'S THEORY.

We respectfully submit that the case of *State Brewing Company, et al. v. District Court,* 2nd Judicial District in and for Silver Bow County, et al., Supreme Court of Montana, March 11, 1940, 100 P. (2d) 932, is very similar in its facts with the instant case and correctly states the construction to be placed upon the provisions of the policy here involved. We believe this case merits careful reading as it is essentially on all fours with the instant case. The insured's policy covering beer delivery trucks was identical with the policy provisions in the instant case:

> "On May 3, 1938, the brewing company was engaged in delivering a barrel of beer to a place known as 'Clifford's' at 11 East Broadway in the City of Butte. The beer was about to be delivered into the basement through certain hinged doors in the sidewalk. On the day in question the beer had been taken from the brewing company's truck and placed upon the sidewalk. As plaintiff was walking along the sidewalk one of the servants of the brewing company, without warning to McCulloch, lifted the doors from underneath the sidewalk preparatory to lowering the beer into the cellar through the door. The door was lifted just as McCulloch stepped on it, and as a result he was injured."

The insurer declined to defend, contending:

> "* * * the use of the automobile had ceased, the unloading had been accomplished and the delivery of the beer to the customer had commenced, and since the delivery, undertaken after the beer had been removed from the truck, was a part of

the business of the brewing company and entailed no further use of the truck, the contract of the indemnity company, and not of the insurance company, protects the brewing company.

"There are cases involving similar facts though differing in some respects which by analogy support this view. Among such cases may be cited the following: *Stammer v. Kitzmiller,* 226 Wis. 348, 276 N. W. 629; *Franklin Co-op. Creamery Ass'n. v. Employers' Liability Assurance Corp.,* 200 Minn. 230, 273 N. W. 809; *Zurich General Accident etc. Co.,* 118 N. J. L. 317, 192 A. 387; *Caron v. American, etc., Co.,* 277 Mass. 156, 178 N. E. 286; and *John Alt Furniture Co. v. Maryland Casualty Co.,* 8 Cir., 88 F.2d 36."

The Supreme Court of Montana, after considering the cases cited by the appellant here, together with the instant case and the case of *Wheeler v. London, etc., Co.,* 292 Pa. 156, 140 A. 855, 856, stated:

"We hold that under the facts here presented the unloading of the truck was a continuous operation from the time the truck came to a stop and the transportation ceased until the barrel of beer was delivered to the customer. The unloading of the truck cannot be said to have been accomplished when the barrel of beer was placed upon the sidewalk. As well might it be argued that the loading of the truck consisted merely of the act of lifting commodities from the ground to the body of the truck. The loading of the truck would contemplate much more than that. It would embrace the entire process of moving the commodities from their accustomed place of storage or the place from which they were being delivered until they

had been placed on the truck. This being so, the insurance company policy has application. The court properly overruled the demurrer of the insurance company."

We submit that for the foregoing reasons the judgment of the District Court should be affirmed.

Dated, Oakland, California,
June 14, 1940.

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